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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

**IN RE: CATHODE RAY TUBE (CRT)
ANTITRUST LITIGATION**

Master File No. 3:07-cv-5944-JST

MDL No. 1917

This Document Relates to:
All Indirect Purchaser Actions

**RESPONSE TO ORDER TO SHOW CAUSE
RE: OBJECTION TO EX PARTE
COMMUNICATIONS**

Date: None
Time: None
Courtroom: 9, 19th Floor
Judge: Honorable Jon S. Tigar

Pursuant to this Court's Order to Show Cause Re: Objection to Ex Parte Communications (Dkt. 4456), the undersigned hereby "provide authority in support of their request that the Court order the Special Master to produce his time records." *See id.* at 2. The requested materials are notes and entries in the Special Master's time records that memorialize in-person or telephonic communications with Counsel.

This Court's Order appointing the Special Master established the parameters of *ex parte* communications between the Special Master and counsel in this case. Dkt. 4077 at ¶ 6. There is general agreement that *ex parte* communications beyond those permitted by that order took place between Lead Counsel and the Special Master. Courts have the inherent authority to enforce compliance with their own orders. *California v. United States Dept. of Labor*, No. 13-cv-2069, 2016 U.S. Dist. LEXIS 2530, at *9 (E.D. Cal. Jan. 9, 2016) (citing *Peacock v. Thomas*, 516 U.S. 349, 356 (1996)); *SEC v. Hermil, Inc.*, 838 F.2d 1151, 1153 (11th Cir. 1988) ("Included in a district court's power to administer its decrees is the power to construe and interpret the language of the original order."); *U.S. v. Spallone*, 399 F.3d 415, 418 (2d Cir. 2005). Securing the notes and time records of the Special Master that evidence communications with Counsel will assist the Court in the discharge of its inherent authority to enforce its orders.

Ex parte communications involve a fundamental issue of fairness generally, and particularly in the context of evaluating the adequacy of a class action settlement. *Glass v. UBS Fin. Servs.*, 15 Wage & Hour Cas. 2d (BNA) 1330, 2007 U.S. Dist. LEXIS 8476, at *34-35 (N.D. Cal. Jan. 26, 2007) ("the Court is confident that [Special Master] Judge Legge, as a former federal judge, is well aware of the need to avoid *ex parte* communications absent specific authorization"); *see also*, Notes of the Advisory Committee on the 2003 Amendments to Rule 53, subd. (b) (stating that "difficult questions surround *ex parte* communications between a master and the parties" and that "[i]n most settings, [] *ex parte* communications with the parties should be discouraged or prohibited"). Rule 23(d) of the Federal Rules of Civil Procedure "vests a district court with the authority and discretion to protect the interests and rights of class members and to ensure its control over the integrity of the settlement approval process." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1025 (9th Cir. 1998). *See also*, Fed. R. Civ. Proc. 23(e).

1 A court's duty to enforce compliance with its orders and ensure fundamental fairness of the
2 adjudicative process before a Special Master encompasses the authority to question and review the
3 Special Master's records. In *EEOC v. United States Steel Corp.*, 95 Empl. Prac. Dec. (CCH)
4 ¶44,471, 2012 U.S. Dist. LEXIS 49167 (W.D. Pa. Apr. 5, 2012) ("*EEOC*"), the Equal
5 Employment Opportunity Commission ("*EEOC*") filed a motion for reconsideration of an order
6 adopting a Special Master's Supplemental Report and Recommendation because U.S. Steel
7 submitted one *ex parte* letter that allegedly addressed the merits. *Id.* at *2. Although the Court
8 denied the motion, it did elicit further information directly from the Special Master. The order
9 appointing the Special Master there set forth boundaries for *ex parte* communications substantially
10 similar to the order appointing Special Master Quinn. *Id.* at *9,*25; compare Dkt. 4077 at ¶ 6.

11 The Court's inquiry in *EEOC* took several forms. The Special Master was called to testify
12 at the hearing regarding *EEOC*'s motion because the parties had participated in a telephone
13 conference with the Special Master that was not transcribed and the content of which was disputed.
14 *Id.* at *10. Prior to the hearing, the Special Master filed an affidavit with the Court addressing her
15 recollection of reading or using the *ex parte* letter in formulating her R&R. *Id.* at *16. After the
16 hearing, the Court "directed the Special Master to search her files for any notes she took during the
17 [telephone] conference with the parties and for her bill regarding the same." *Id.* at *18. Here, like
18 *EEOC*, there is no dispute that *ex parte* communications occurred. As there, the Special Master's
19 notes and time records are being sought to determine the full extent and nature of these
20 communications so that the Court may assess their potential impact on the R&R. There is good
21 cause for this Court to elicit further information directly from the Special Master.

22 This is not a situation like those in which courts prohibit parties from taking discovery of
23 Special Masters concerning their mental processes. *Cobell v. Norton*, 237 F. Supp. 2d 71, 102
24 (D.D.C. 2003) (declining to compel deposition of special masters); *Gary W. v. State of Louisiana*
25 *Dep't of Health & Human Servs.*, 861 F.2d 1366, 1369 (5th Cir. 1988) ("mental processes rule has
26 been applied to prevent involuntary testimony of judicial and quasi-judicial officers); *Alford v.*
27 *Aaron Rents, Inc.*, No. 08-cv-683, 2010 U.S. Dist. LEXIS 91097, at *6 (S.D. Ill. Sept. 2, 2010)
28 ("The Court finds that Professor Dorothy as Special Master is not subject to discovery of his

1 mental processes.”)

2 Here, the purpose is not to determine what the Special Master thought about the issues, but
 3 rather to whom he spoke and the subject matter of the communication. Securing copies of these
 4 time entries and notes is an entirely objective exercise regarding the existence of non-
 5 administrative *ex parte* communications. Further, it is not necessary for the parties to see the notes
 6 or time records (although many Special Masters routinely submit time records to the parties as
 7 support for their billing statements). The purpose for which the undersigned are requesting the
 8 records would be equally well served by having the Special Master produce his notes and time
 9 records solely to Your Honor for inspection *in camera*.

10 Dated: March 8, 2016

Respectfully submitted,

11 /s/ Josef D. Cooper

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24 Pursuant to Civil L.R. 5-1(i), the filer attests that the concurrence in the filing of this document has
 25 been obtained from each of the above signatories.